UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROSAMMA SAJI, Plaintiff, -against- NASSAU UNIVERSITY MEDICAL CENTER, Defendant.	Case No. 2:13-cv-3866 (JS) (AKT)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NASSAU UNIVERSITY MEDICAL CENTER'S MOTION FOR RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

RELEVANT PROCEDURAL HISTORY AND BACKGROUND 3

LEGAL STANDARD FOR MOTION FOR RECONSIDERATION 4

ARGUMENT 5

I. PLAINTIFF CANNOT PREVAIL ON HER FAILURE TO RE-HIRE CLAIM BECAUSE SHE NEVER APPLIED FOR THE ACCIDENTALLY POSTED RN-IV POSITION 5

II. PLAINTIFF CANNOT PREVAIL ON HER FAILURE TO RE-HIRE CLAIM BECAUSE SHE NEVER INTRODUCED ADMISSIBLE EVIDENCE CAPABLE OF ESTABLISHING THAT NUMC INTENTIONALLY POSTED THE RN-IV POSITION IN APRIL 2012 7

III. THE COURT MISTAKENLY DETERMINED THAT THE APRIL 2012 RN-IV JOB POSTING CONSTITUTED AN ADVERSE EMPLOYMENT ACTION 7

IV. THE COURT OVERLOOKED THE UNREBUTTED FACT THAT PLAINTIFF IS NOT QUALIFIED FOR THE RN-IV POSITION IN NUMC'S OPERATING ROOM 9

V. PLAINTIFF CANNOT PREVAIL ON HER FAILURE TO RE-HIRE CLAIM BECAUSE SHE NEVER APPLIED FOR THE RN-IV POSITION IN THE OPERATING ROOM 10

VI. THE EVIDENCE PLAINTIFF INTRODUCED IS INSUFFICIENT TO ESTABLISH THAT HER PROTECTED ACTIVITY WAS THE "BUT-FOT" REASON NUMC DID NOT RE-HIRE HER 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Abrahamson v. Bd. of Educ.,
237 F. Supp. 2d 507 (S.D.N.Y. 2002) 4

Broughton v. Conn. Student Loan Found.,
64 F. Supp. 2d 64 (D. Conn. 1999)....8

Brown v. Coach Stores, Inc.,
163 F.3d 706 (2d Cir. 1998) 1, 2, 5, 6, 8, 10

Chenette v. Kenneth Cole Prods., Inc.,
No. 05 Civ. 4849 (DLC), 2008 U.S. Dist. LEXIS 69634
(S.D.N.Y. Sept. 16, 2008) 5

Dall v. St. Catherine of Siena Med. Ctr.,
966 F. Supp. 2d 167 (E.D.N.Y. 2013) 12

Figueroa v. City of N.Y.,
No. 00 Civ. 7559 (SAS), 2002 U.S. Dist. LEXIS 18340
(S.D.N.Y. Sept. 27, 2002), *aff'd*, 118 F. App'x 524 (2d Cir.
2004) 5

Graham v. City of N.Y.,
No. 08-CV-3518 (KAM) (RML), 2010 U.S. Dist. LEXIS 78184
(E.D.N.Y. Aug. 3, 2010) 4

Gupta v. N.Y.C. Sch. Constr. Auth.,
No. 04-CV-2896 (NGG) (LB), 2007 U.S. Dist. LEXIS 45954
(E.D.N.Y. June 25, 2007), *aff'd*, 305 F. App'x 687 (2d Cir. 2008)..1, 2, 6, 10

Gupta v. N.Y.C. Sch. Constr. Auth.,
305 F. App'x 687 (2d Cir. 2008) 5, 6, 10

Hedgeco, LLC v. Schneider,
No. 08 Civ. 494 (SHS), 2009 U.S. Dist. LEXIS 43988 (S.D.N.Y.
May 7, 2009)....4

Kinsella v. Rumsfeld,
320 F.3d 309 (2d Cir. 2003) 1, 2, 5, 6, 10

Kwan v. Andalex Grp., LLC,
737 F.3d 834 (2d Cir. 2013) 11, 12

LaRou v. Ridlon,
98 F.3d 659 (1st Cir. 1996)...6

Macellaro v. Goldman,
643 F.2d 813 (D.C. Cir. 1980)..8

McGarty v. City of N.Y.,
No. 12-CV-2813 (NRB), 2014 U.S. Dist. LEXIS 130622
(S.D.N.Y. Sept. 16, 2014) 11

Microsoft Corp. v. AGA Solutions, Inc.,
No. 05 Civ. 5796 (DHR) (MLO), 2009 U.S. Dist. LEXIS 33149
(E.D.N.Y. Apr. 17, 2009) 4, 5

Paul v. Postgraduate Ctr. for Mental Health,
97 F. Supp. 3d 141 (E.D.N.Y. 2015) 13

Shrader v. CSX Transp., Inc.,
70 F.3d 255 (2d Cir. 1995) 4

Terrell v. Paulding Cnty.,
539 F. App'x 929 (11th Cir. 2013)..8

Turner v. Ky. Transp. Cabinet,
574 F. App'x 664 (6th Cir. 2014)..8

Univ. of Tex. Sw. Med. Ctr. v. Nassar,
133 S. Ct. 2517 (2013)...11

Verga v. Emergency Ambulance Serv., Inc.,
No. 12-CV-1199 (DRH) (ARL), 2014 U.S. Dist. LEXIS 161512
(E.D.N.Y. Nov. 18, 2014) 11, 12

Wojcik v. Brandiss,
973 F. Supp. 2d 195 (E.D.N.Y. 2013) 13

Statutes **Page(s)**

Fed. R. Civ. P. 56(c) 7

Fed. R. Civ. P. 59(e) 1, 4, 13

E.D.N.Y. Local Rule 6.3 .... 1, 4, 13

E.D.N.Y. Local Rule 56.1 .... 1, 3, 7

Defendant Nassau University Medical Center ("NUMC"), by and through its attorneys, respectfully moves this Court pursuant to Eastern District of New York Local Rule 6.3 and Federal Rule of Civil Procedure 59(e) for reconsideration of the Court's decision to deny NUMC's motion for summary judgment dismissal of Plaintiff's retaliatory failure to re-hire claim.

PRELIMINARY STATEMENT

NUMC respectfully asks the Court to reconsider whether it overlooked one or more critical facts regarding Plaintiff's retaliatory failure to re-hire claim. These suggested overlooked facts are as follows. First, Plaintiff never presented any evidence that she actually applied for a RN-IV position. She merely expressed an interest through her attorney that she thought she should be hired for a RN-IV position NUMC posted online (accidentally) after it terminated her employment. Pl's. Aff., Dkt. No. 42, ¶ 23. As discussed further herein, the Second Circuit has held a failure to re-hire claim is barred when the plaintiff never applied for the position. *Gupta v. N.Y.C. Sch. Constr. Auth.*, No. 04-CV-2896 (NGG) (LB), 2007 U.S. Dist. LEXIS 45954, at *20 (E.D.N.Y. June 25, 2007), *aff'd*, 305 F. App'x 687 (2d Cir. 2008) (summary order); *see also Kinsella v. Rumsfeld*, 320 F.3d 309, 314-15 (2d Cir. 2003); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir. 1998).

Second, there is no admissible evidence to dispute the fact that NUMC *accidentally* posted the RN-IV job vacancy shortly after Plaintiff's layoff. Plaintiff's Counterstatement of Facts pursuant to Local Rule 56.1 speaks volumes. She can only offer a bald unsupported assertion that the job posting was supposedly intentional. *See* Pl's. Local R. 56.1 Counterstatement of Facts, Dkt. No. 43, ¶ 80 (*citing* Zink Decl., Dkt. No. 37, ¶ 20). Accordingly, there is no dispute that NUMC ever intended to actually hire a RN-IV in or around the same time as the accidental April 2012 job posting.

Third, it is undisputed that NUMC never hired anyone for the RN-IV position in which Plaintiff claims to have expressed interest through her attorney in or around April 2012. *Id.* at ¶ 83. It goes without saying that Plaintiff could not have suffered an adverse employment action until NUMC actually filled the position for which she applied (which she never did in the first place). Therefore, the accidental April 2012 job posting is completely irrelevant for purposes of Plaintiff's failure to re-hire claim.

Fourth, the only RN-IV position that NUMC has filled since terminating Plaintiff's employment is a RN-IV in the Operating Room – a different department than the department in which Plaintiff worked. Zink Decl., Dkt. No. 37, ¶ 21. More importantly, a RN-IV in the Operating Room needs a substantially different skill set than a RN-IV in Nursing Administration, the latter of which is the department in which Plaintiff worked during her employment at NUMC. *Id.* Plaintiff *never* introduced any evidence that she was qualified for this separate RN-IV position.

Fifth, even if Plaintiff had alleged she was qualified for the RN-IV position in the Operating Room, which she never did, the fact remains that she never applied for this position either. This means NUMC's decision to eventually hire a RN-IV in the Operating Room is irrelevant. *Gupta*, 2007 U.S. Dist. LEXIS 45954, at *20; *see also Kinsella*, 320 F.3d at 314-15; *Brown v. Coach Stores, Inc.*, 163 F.3d at 710.

Finally, even if Plaintiff had alleged she was qualified for the RN-IV position in the Operating Room *and* had applied for the position, neither of which she ever did, NUMC did not fill the RN-IV position in the Operating Room until approximately six months after her protected activity. This scant evidence cannot satisfy the "but-for" causation standard. There is simply no evidence to suggest that, "but-for" her attorney's letter six months earlier, NUMC would have ever hired Plaintiff for the RN-IV position in the Operating Room – a position for which she never applied and was not qualified.

As discussed in more detail below, NUMC respectfully submits the Court overlooked these facts and the relevant case law cited herein, all of which taken together requires dismissal of Plaintiff's retaliatory failure to re-hire claim.

RELEVANT PROCEDURAL HISTORY AND BACKGROUND

Plaintiff asserted claims against NUMC for alleged national origin discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York State Human Rights Law ("Human Rights Law"). Compl. ¶ 24.[1] The Court granted NUMC's summary judgment motion as to the national origin discrimination claims and the retaliatory discipline claim. Order, Dkt. No. 47, at 27-29. However, the Court denied NUMC's summary judgment motion as to the retaliatory failure to re-hire claim. *Id.* at 35-38.

Plaintiff alleges NUMC unlawfully failed to hire her in retaliation for her attorney's letter to NUMC dated March 28, 2012. In that letter, Plaintiff complained to NUMC for the first time about national origin discrimination. *See* Pl's. Local R. 56.1 Counterstatement of Facts, Dkt. No. 43, ¶ 62. On April 16, 2012, NUMC accidentally posted a job opening for an RN-IV in Nursing Administration. *See id.* at ¶ 80 (*citing* Pl's. Aff., Dkt. No. 42, ¶ 20). At or around the same time, Plaintiff's attorney "contacted NUMC to express that [she] should be given that open position." Pl's. Aff., Dkt. No. 42, ¶ 23. Upon realizing the job posting had been made in error, NUMC promptly withdrew the job posting without ever filling the position. *See* NUMC's Local R. 56.1 Statement of Facts, Dkt. No. 39, ¶¶ 80-81, 83; Pl's. Aff., Dkt. No. 42, ¶ 23.

[1] The Complaint also initially included a hostile work environment claim, but Plaintiff stipulated to the dismissal with prejudice of that claim prior to NUMC's summary judgment motion. Stipulation of Dismissal of Claims with Prejudice, Dkt. No. 33.

On October 9, 2012, NUMC hired an RN-IV in the Operating Room. Zink Decl., Dkt. No. 37, ¶ 21. This is the only RN-IV NUMC has hired in any department since Plaintiff's termination of employment on March 2, 2012. *Id.* Plaintiff does not allege that she is qualified to work as an RN-IV in the Operating Room, much less that she ever applied for this position. Indeed, as discussed below, there is no evidence to controvert NUMC's claim that the RN-IV position in the Operating Room is a specialized position for which Plaintiff does not possess the requisite experience or qualifications. *See id.*

LEGAL STANDARD FOR MOTION FOR RECONSIDERATION

"The standards governing a motion for reconsideration under Local Rule 6.3 are the same as those under Federal Rule of Civil Procedure 59(e)." *Abrahamson v. Bd. of Educ.*, 237 F. Supp. 2d 507, 510 (S.D.N.Y. 2002) (internal citations omitted).[2] "To prevail on a motion for reconsideration, the movant must demonstrate that a court overlooked factual matters or controlling decisions that might reasonably be expected to alter the conclusion reached." *Hedgeco, LLC v. Schneider*, No. 08 Civ. 494 (SHS), 2009 U.S. Dist. LEXIS 43988, at *5-6 (S.D.N.Y. May 7, 2009) (granting motion for reconsideration of denial of summary judgment where the court overlooked facts relevant to whether plaintiff could prove that it suffered damages, an essential element of each of the three remaining claims) (internal quotations omitted); see also *Abrahamson*, 237 F. Supp. 2d at 510; *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 256 (2d Cir.1995) (finding no error where lower court granted motion for reconsideration).

A court will grant such a motion where it failed to take account of record evidence which, if considered by the court, would have mandated a different result. *See e.g., Microsoft Corp. v.*

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[2] Courts of the Eastern District of New York are governed by the same Local Rules as the Courts of the Southern District of New York. *See Graham v. City of N.Y.*, No. 08-CV-3518 (KAM) (RML), 2010 U.S. Dist. LEXIS 78184, at *2-3 n.1 (E.D.N.Y. Aug. 3, 2010) ("[C]ourts of the Southern District . . . are governed by the same Local Rules as the Eastern District . . . .").

AGA Solutions, Inc., No. 05 Civ. 5796 (DHR) (MLO), 2009 U.S. Dist. LEXIS 33149, at *5 (E.D.N.Y. Apr. 17, 2009) (granting motion for reconsideration of denial of summary judgment where movant directed the court's attention to additional evidence, submitted initially on the summary judgment motion); *Chenette v. Kenneth Cole Prods., Inc.*, No. 05 Civ. 4849 (DLC), 2008 U.S. Dist. LEXIS 69634, at *8 (S.D.N.Y. Sept. 16, 2008) (granting motion for reconsideration and dismissing sole remaining claim on summary judgment where court's opinion had omitted analysis of the facts relating to two elements of a claim). The decision to grant or deny a motion for reconsideration lies within the sound discretion of the district court. *See Figueroa v. City of N.Y.*, No. 00 Civ. 7559 (SAS), 2002 U.S. Dist. LEXIS 18340, at *3 (S.D.N.Y. Sept. 27, 2002) (granting motion for reconsideration where the court overlooked several facts that were before it on a motion for summary judgment), *aff'd*, 118 F. App'x 524 (2d Cir. 2004) (summary order).

ARGUMENT

I. PLAINTIFF CANNOT PREVAIL ON HER FAILURE TO RE-HIRE CLAIM BECAUSE SHE NEVER APPLIED FOR THE ACCIDENTALLY POSTED RN-IV POSITION

A plaintiff must actually apply for a position in order to prevail on a failure to hire claim. *See Gupta*, 2007 U.S. Dist. LEXIS 45954, *aff'd*, 305 F. App'x at 690 ("Because Gupta cannot claim retaliation based on defendant's failure to rehire him for a position for which he did not apply, this claim was properly dismissed."); *see also Kinsella*, 320 F.3d at 314-15 (affirming dismissal of a failure to promote claim where the plaintiff repeatedly requested but never formally applied for the promotion in question); *Brown v. Coach Stores, Inc.*, 163 F.3d at 710 ("We read *McDonnell Douglas* and *Burdine* generally to require a plaintiff to allege that she or he applied for a specific position or positions and was rejected therefrom, rather than merely asserting that on several occasions she or he generally requested promotion.").

Merely expressing interest in a position will not satisfy a plaintiff's application requirement for a failure to hire claim. *Gupta*, 2007 U.S. Dist. LEXIS 45954, at *20-21; *cf. Kinsella*, 320 F.3d at 314-15 (repeatedly requesting a promotion held to be insufficient in the failure to promote context); *see also LaRou v. Ridlon*, 98 F.3d 659, 664 (1st Cir. 1996) ("[*T*]*he mere posting of a position does not constitute an 'adverse employment action'* . . . provided the plaintiff . . . elected not to apply.") (emphasis added). The plaintiff in *Gupta* alleged he applied for jobs at the defendant "through private agencies" and specifically called the defendant over the telephone to express his interest in reinstatement to his former position. *Id*. at *20. The District Court in that case nonetheless dismissed the plaintiff's retaliatory failure to hire claim because it determined he never actually applied for the job he claimed he was denied. *Id*. at *21. The Second Circuit affirmed and warned that any contrary result would otherwise impose an "unfair burden" on employers "to keep track of all former employees who have generally expressed an interest in being rehired and to consider each of them for any opening for which they are qualified but did not specifically apply." *Gupta*, 305 F. App'x at 690 (quoting *Brown v. Coach Stores, Inc.*, 163 F.3d at 710) (internal quotations and alteration marks omitted).

The same facts are present in the case at bar. Plaintiff never applied for the accidentally posted RN-IV position in April 2012. She merely had her attorney contact NUMC "to express that [she] should be given that open position." Pl's. Aff., Dkt. No. 42, ¶ 23. The Court overlooked this fact when it held that "Plaintiff satisfies the 'very close' temporal proximity standard" because the "April 2012 RN-IV job posting came less than a month after Plaintiff's March 28, 2012 letter." Order, Dkt. No. 47, at 35. Under the controlling precedent cited above, more is needed than a job posting to satisfy the "very close temporal proximity standard." That is, the plaintiff must actually apply for the job she claims she was denied due to retaliation. Plaintiff never did that here.

Therefore, reconsideration of the decision to deny summary judgment dismissal of her retaliatory failure to re-hire claim is warranted.

II. PLAINTIFF CANNOT PREVAIL ON HER FAILURE TO RE-HIRE CLAIM BECAUSE SHE NEVER INTRODUCED ADMISSIBLE EVIDENCE CAPABLE OF ESTABLISHING THAT NUMC INTENTIONALLY POSTED THE RN-IV POSITION IN APRIL 2012

Plaintiff never introduced *admissible* evidence to refute NUMC's assertion that the RN-IV job posting in April 2012 was an accident. Pl's. Local R. 56.1 Counterstatement of Facts, Dkt. No. 43, ¶ 80 (*citing* Pl's. Aff., Dkt. No. 42, ¶ 20). She merely asserts in conclusory fashion that the April 2012 RN-IV job posting was not accidental. *Id*. Plaintiff must do more to create a genuine dispute of material fact regarding NUMC's claim that the job was posting was unintentional. *See* Local R. 56.1(d) (requiring that each statement controverting a moving party's statement of material facts "must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c)"). She cannot rely on her speculative assertion to the contrary, for which she obviously has no personal knowledge. The Court never addressed Plaintiff's failure to introduce evidence capable of refuting NUMC's claim that the April 2012 RN-IV job posting was an accident. Meanwhile, NUMC's claim is supported by admissible evidence in the form of the Declaration of Janeann Zink, the Nursing Manager responsible for hiring. *See* Zink Decl., Dkt. No. 37, ¶ 20. Insofar as the Court relied upon the accidental job posting to rule in Plaintiff's favor on the "very close temporal proximity standard," *see* Order, Dkt. No. 47, at 35, reconsideration is warranted because there is no evidence in the record capable of refuting NUMC's claim that the April 2012 RN-IV job posting was an accident.

III. THE COURT MISTAKENLY DETERMINED THAT THE APRIL 2012 RN-IV JOB POSTING CONSTITUTED AN ADVERSE EMPLOYMENT ACTION

Equally problematic for Plaintiff's retaliatory failure to re-hire claim is the undisputed fact that NUMC withdrew the April 2012 RN-IV job posting and never filled the position after

Plaintiff's March 28, 2012 attorney's letter. *See* Pl's. Aff., Dkt. No. 42, ¶ 23; Zink Decl., Dkt. No. 37, ¶ 21. The Court incorrectly held that the mere posting of a RN-IV position in April 2012 constituted an adverse employment action within the two- to three-month "very close temporal proximity standard." *See* Order, Dkt. No. 47, at 35. However, a plaintiff alleging retaliatory failure to hire suffers no injury or adverse employment action when the position plaintiff seeks is withdrawn. *See Macellaro v. Goldman*, 643 F.2d 813, 816 (D.C. Cir. 1980) (withdrawal of vacant position "simply did not injure" plaintiff, as it "harmed [him] no more than it did any other applicant because the job was never filled"); *Turner v. Ky. Transp. Cabinet*, 574 F. App'x 664, 666 (6th Cir. 2014) (summary order) (plaintiff alleging retaliatory failure to hire suffered no adverse employment action when the vacancy was withdrawn); *Broughton v. Conn. Student Loan Found.*, 64 F. Supp. 2d 64, 67 (D. Conn. 1999) (plaintiff suffered no adverse employment action where position was "vacated and then eliminated" since "there was no position to be filled") (citing *Brown v. Coach Stores, Inc.*, 163 F.3d at 710).

This is the case even when a plaintiff actually submits an application before the position is withdrawn. *See Terrell v. Paulding Cnty.*, 539 F. App'x 929, 933 (11th Cir. 2013) (summary order) ("Regarding the [] position for which [plaintiff] applied, it is undisputed that the County never filled this position. On this record, we agree . . . that [plaintiff] did not suffer an adverse employment action."); *Turner*, 574 F. App'x at 666 ("[Plaintiff] applied one time to be promoted . . . but the position was withdrawn due to a hiring freeze and was not filled at that time. . . . [Plaintiff] thus failed to establish a prima facie case of retaliation . . . .").

The undisputed facts do not permit the determination that Plaintiff suffered an adverse employment action within the two- to three-month window after her March 28, 2012 attorney's letter to NUMC. She cannot rebut NUMC's claim that the April 2012 job posting was an accident.

She does not dispute that NUMC immediately withdrew the job posting after learning of the accident. She further does not dispute that NUMC never hired another RN-IV in Nursing Administration (which is the same department in which Plaintiff worked). As discussed further below, the only RN-IV NUMC has hired since Plaintiff's protected activity is a RN-IV in the Operating Room – a position for which Plaintiff was not qualified and, more importantly, never applied. Zink Decl., Dkt. No. 37, ¶ 21. Accordingly, the Court should reconsider whether NUMC's mere posting of a RN-IV job in April 2012 satisfied Plaintiff's burden to establish a "very close temporal connection" between her protected activity and any purported adverse employment action.[3]

IV. THE COURT OVERLOOKED THE UNREBUTTED FACT THAT PLAINTIFF IS NOT QUALIFIED FOR THE RN-IV POSITION IN NUMC'S OPERATING ROOM

The only RN-IV NUMC hired following Plaintiff's protected activity is a RN-IV in the Operating Room on or about October 9, 2012. Zink Decl., Dkt. No. 37, ¶ 21. A hospital's operating room is, naturally, a different work environment than most other departments within the hospital. It logically follows that the RN-IV position in the Operating Room is a specialized role requiring a different skillset than is required by RN-IVs in other departments. *See id.* NUMC presented unrebutted evidence that Plaintiff was not qualified for this role. *Id.*

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[3] NUMC further requests the Court reconsider its determination that NUMC conceded Plaintiff satisfied her burden to establish an adverse employment action for her retaliatory failure to re-hire claim. *See* Order, Dkt. No. 47, at 35 ("The parties further agree that NUMC's decision not to rehire Plaintiff after NUMC's job posting is an adverse employment action."). The Court does not cite to any of NUMC's papers in support of this determination. *See also id.* at 34. Additionally, NUMC repeatedly argued within its motion papers that Plaintiff's retaliatory failure to re-hire claim should be dismissed because it is undisputed that NUMC never hired anyone to replace Plaintiff's position. *See, e.g.*, NUMC's Mem. of Law in Support of Summ. J. Mot., Dkt. No. 35, at 2, 15, 23. In particular, NUMC expressly stated in its initial memorandum of law that neither the 10-day leave bank deduction nor NUMC's decision not re-hire Plaintiff qualified as adverse employment actions for purposes of her retaliation claim. *See id.* at 2 ("Even if these two decisions could qualify as adverse employment actions for purposes of a retaliation claim, which they cannot, . . .").

The Court nevertheless determined that NUMC's decision to hire a RN-IV in the Operating Room approximately six months after Plaintiff's protected activity satisfied both Plaintiff's *prima facie* burden and her more stringent burden to establish "but-for" causation. *See* Order, Dkt. No. 47, at 36-38. Respectfully, the Court overlooked Plaintiff's complete failure to raise a genuine issue of material fact regarding her qualifications for the RN-IV position in the Operating Room. Without any allegations, let alone evidence, that Plaintiff possessed the requisite experience and skillset for the RN-IV position in the Operating Room, NUMC's subsequent decision to hire a RN-IV in the Operating Room is irrelevant for purposes of Plaintiff's retaliation claim. This is just another undisputed fact that requires reconsideration of the Court's denial of summary judgment for the retaliatory failure to re-hire claim.

V. PLAINTIFF CANNOT PREVAIL ON HER FAILURE TO RE-HIRE CLAIM BECAUSE SHE NEVER APPLIED FOR THE RN-IV POSITION IN THE OPERATING ROOM

Even assuming *arguendo* that Plaintiff had presented evidence capable of establishing that she was qualified for the RN-IV position in the Operating Room, which she never did, her claim is still barred as a matter of law because she never applied for the position. Under the same Second Circuit decisions discussed above, Plaintiff's failure to apply means NUMC's hiring of another candidate for the position does not qualify as an adverse employment action. *See Gupta*, 2007 U.S. Dist. LEXIS 45954, at *20, *aff'd*, 305 F. App'x 687; *see also Kinsella*, 320 F.3d at 314-15; *Brown v. Coach Stores, Inc.*, 163 F.3d at 710. It similarly bars her from establishing the requisite causal connection between her protected activity and NUMC's decision not to hire her for that role. *See Gupta*, 305 F. App'x at 690 (warning that employers should not be required to keep track of all instances in which an employee may have expressed interest in a position to which the employee did not explicitly apply) (quoting *Brown v. Coach Stores, Inc.*, 163 F.3d at 710) (internal quotations and alteration marks omitted).

Notwithstanding the foregoing, in connection with its denial of summary judgment as to the retaliatory failure to re-hire claim, the Court emphasized NUMC's hiring of another candidate for the RN-IV position. *See* Order, Dkt. No. 47, at 36-38. Accordingly, NUMC respectfully requests the Court reconsider whether NUMC's subsequent hiring of a RN-IV in the Operating Room six months after Plaintiff's protected activity is sufficient to defeat summary judgment dismissal.

VI. The Evidence Plaintiff Introduced is Insufficient to Establish that Her Protected Activity was the "But-For" Reason NUMC did not Re-Hire Her

Finally, even if Plaintiff had applied for either of the RN-IV positions, and even if she had alleged she was qualified for the RN-IV position in the Operating Room, neither of which she ever did, her limited evidence still comes nowhere near satisfying her ultimate burden to prove that NUMC's proffered reasons for not re-hiring her are a pretext for unlawful retaliation. In order to carry this causation burden, Plaintiff must produce evidence "that retaliation was the 'but-for' cause of the adverse treatment." *McGarty v. City of N.Y.*, No. 12-CV-2813 (NRB), 2014 U.S. Dist. LEXIS 130622, at *49 (S.D.N.Y. Sept. 16, 2014) (holding that temporal proximity greater than three months between protected activity and adverse employment action warranted summary judgment dismiss) (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)). Specifically, to prove "but-for" causation, the plaintiff must come forward with evidence capable of establishing "that the adverse action would not have occurred in the absence of the retaliatory motive." *Verga v. Emergency Ambulance Serv., Inc.*, No. 12-CV-1199 (DRH) (ARL), 2014 U.S. Dist. LEXIS 161512, at *11 (E.D.N.Y. Nov. 18, 2014) (quoting *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013)).

Here, Plaintiff cannot meet even her *prima facie* burden to establish causation because there is no adverse employment action that occurred within the "very short" two- to three-month window following her protected activity on March 28, 2012. As discussed above, the only things that happened within the three-month period following Plaintiff's attorney letter to NUMC is that NUMC accidentally posted a RN-IV position and Plaintiff's attorney "contacted NUMC to express that [Plaintiff] should be given that open position." Pl's. Aff., Dkt. No. 42, ¶¶ 22-23. These facts do not satisfy Plaintiff's *prima facie* burden to prove retaliation because she never applied for the RN-IV position and NUMC never hired another candidate.

However, even assuming Plaintiff could satisfy her *prima facie* burden, she cannot satisfy her burden to prove that her attorney's March 28, 2012 letter to NUMC was the but-for reason she was not re-hired. *Dall v. St. Catherine of Siena Med. Ctr.*, 966 F. Supp. 2d 167, 194-95 n.15 (E.D.N.Y. 2013) ("While temporal proximity alone may still be sufficient at the prima facie stage, it is not sufficient at the pretext stage."). To meet this higher burden, Plaintiff would need to convince a reasonable jury that NUMC would have re-hired her had she not complained through her attorney of national origin discrimination. *See Verga*, 2014 U.S. Dist. LEXIS 161512, at *11 (quoting *Kwan*, 737 F.3d at 846). She cannot carry this burden for several reasons.

First, as discussed above, there is no disputed issue of fact that NUMC never truly intended to hire a RN-IV in or around April 2012. That is, there is no admissible evidence to establish that the April 2012 job posting was intentional. Moreover, consistent with NUMC's position that the job posting was an accident, it is undisputed that NUMC never hired another RN-IV in Plaintiff's department following Plaintiff's protected activity. There is no similarly situated person to whom Plaintiff may compare herself because NUMC never hired anyone for the accidentally posted RN-IV position.

Second, the only RN-IV NUMC hired after Plaintiff's protected activity occurred approximately six months later. Six months is too long to establish a sufficient temporal connection between a plaintiff's protected activity and an adverse employment action. *See, e.g.*, *Paul v. Postgraduate Ctr. for Mental Health*, 97 F. Supp. 3d 141, 195 (E.D.N.Y. 2015) (holding alleged adverse employment action that occurred six months after protected activity was too temporally remote to support an inference of causation); *Wojcik v. Brandiss*, 973 F. Supp. 2d 195, 216 (E.D.N.Y. 2013) (holding six-month gap between protected activity and adverse employment action too attenuated to avoid summary judgment dismissal of retaliation claim).

Third, Plaintiff never applied for either RN-IV position. No reasonable fact finder, therefore, could conclude that NUMC would have re-hired Plaintiff as a RN-IV but-for her attorney's March 28, 2012 letter.

Fourth, even if Plaintiff had applied, she still was not qualified for the RN-IV position in the Operating room, which is the *only* RN-IV position NUMC has filled since Plaintiff's protected activity. Zink Decl., Dkt. No. 37, ¶ 21. This similarly eliminates any possibility that a reasonable jury could conclude NUMC would have hired Plaintiff for the RN-IV position filled in October 2012 but-for her protected activity.

CONCLUSION

For the reasons set forth above, NUMC respectfully requests, pursuant to Eastern District of New York Local Rule 6.3 and Federal Rule of Civil Procedure 59(e), that this Court reconsider its March 31, 2016 Order to the extent the Court denied summary judgment as to Plaintiff's retaliatory failure to re-hire claim under Title VII and the Human Rights Law.

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